SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 13 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-5751

ZENAIDA SARMENTA SEGURA,
also known as ZENAIDA SARMENTA TOMANENG,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

ROBERT S. BIXBY,
FALLON, HARGREAVES, BIXBY & MCVEY,
90 Hotaling Place,
San Francisco, California 94111,
Attorneys for Petitioner.

GERRALD-WELLS PRINTING CO. - 565 HOWARD STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
Reasons for granting the writ	6
Conclusion	12

Table of Authorities Cited

Cases	Pages
Amarante v. Rosenberg, 326 F.2d 58 (9th Cir. 1964)	6, 7
Ambra v. Aherns, 325 F.2d 468 (1963)	9
Campos v. Immigration and Naturalization Service, 402 F.2d 758 (9th Cir. 1968)	7
Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6th Cir. 1968)	8, 9
Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966)	9, 10, 11, 12
Khadjenouri v. Immigration and Naturalization Service, 460 F.2d 461 (9th Cir. 1972)	5, 6, 8, 9, 10, 11
Lee Fook Chuey v. Immigration and Naturalization Service, 439 F.2d 244 (1971)	11
Matter of Smith, 11 I. & N. Dec. 325 (Board of Immigration Appeals, Oct. 8, 1965)	7

Regulations

Pages

8 C.F.R. 245.1(f) 8

Statutes

Immigration and Nationality Act:
Section 106 (8 U.S.C. 1105a) 4
Section 212(c) 8
Section 212(a)(28)(I)(ii) 8
Section 212(g) 8
Section 212(h) 8
Section 212(i) 8
Section 241(a)(2) (8 U.S.C. 1251(a)(2)) 5
Section 241(f) (8 U.S.C. 1251(f)) 2, 5, 6, 8, 9, 10, 11, 12
Section 245 (8 U.S.C. 1255) 3, 4, 6, 7, 10, 11
Section 246 (8 U.S.C. 1256) 4

28 U.S.C. Section 1254(1) 2

Texts

2 Gordon and Rosenfield, Immigration Law and Procedure, Section 7.7e 7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

ZENAIDA SARMENTA SEGURA,
also known as ZENAIDA SARMENTA TOMANENG,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in this case on April 5, 1974.

OPINIONS BELOW

The order of the Court of Appeals affirming the order of the Board of Immigration Appeals is set

forth at page A-1 of Appendix A, and the order of the Court of Appeals denying petition for rehearing en banc is set forth at page A-2 of Appendix A. The opinion of the Board of Immigration Appeals is set forth in Appendix B.

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on April 5, 1974. A timely petition for rehearing en banc was denied on August 23, 1974, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien who meets all substantive requirements for exemption from deportation under Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), can be denied relief under that section on the ground that she acquired her permanent resident status through the procedure of an adjustment of status within the United States rather than procuring an immigrant visa abroad.

STATUTES INVOLVED

Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), provides:

> "The provisions of this section relating to the deportation of aliens within the United States

on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, provides in pertinent part, as follows:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under section 203(a)

within the class to which the alien is chargeable, for the fiscal year then current."

STATEMENT

Petitioner is a native and citizen of the Philippines, now twenty-nine years of age (R. 13)[1]. She was admitted to the United States on January 27, 1968 as a visitor (R. 13, 30).

On April 1, 1969, petitioner's status was adjusted to that of an alien lawfully admitted for permanent residence pursuant to the provisions of section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255 (R. 13, 32). Her admission for permanent residence was predicated upon her marriage to Manuel Tomaneng, a permanent resident alien. Thereafter, it was determined that petitioner had married Tomaneng solely for the purpose of obtaining permanent resident status, and her status was accordingly rescinded under Section 246 of the Immigration and Nationality Act, 8 U.S.C. 1256, on August 12, 1972 (R. 13-14, 32).

Prior to the rescission of her permanent resident status, the petitioner obtained a Final Judgment of Divorce from Tomaneng, and on December 2, 1971, she married Rodolfo Segura, then a permanent resident alien (R. 15, 34).[2] The petitioner and her present

[1] "R." References are to the certified administrative record, filed in the Court below in response to the petition for review, pursuant to section 106 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a.

[2] Rodolfo Segura is now a United States citizen, having been naturalized on July 19, 1974 in the United States District Court at San Jose, California and issued Naturalization Certificate No. 9667162.

husband have lived together continuously since their marriage, and they are the parents of a United States citizen child born in San Francisco, California on January 15, 1972 (R. 15, 33).[3]

On March 14, 1973, petitioner was served with an order to show cause alleging that because her permanent resident status had been rescinded on the basis of her fraudulent marriage to Tomaneng, she was subject to deportation under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as a nonimmigrant who had overstayed the period of her authorized stay (R. 30-32). At her deportation hearing before an immigration judge petitioner denied deportability, contending that she was saved from deportation by the provisions of section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f) (R. 16 et seq.).[4]

The immigration judge held that section 241(f) did not apply to the petitioner and ordered her to be deported to the Philippines (R. 13-15). The Board of Immigration Appeals dismissed petitioner's appeal, citing *Khadjenouri v. Immigration and Naturalization Service*, 460 F.2d 461 (9th Cir. 1972), for its conclu-

---

[3]The petitioner and her husband expect a second child within the next two months.

[4]In the administrative proceedings below petitioner contended that section 241(f) applied to her because: (1) She had obtained her visitor's visa by fraud, and (2) she had obtained her permanent resident status through a fraudulent marriage. In the Court below, the petitioner abandoned her first contention and relied solely upon her second contention—that her deportation should be waived under section 241(f) because she procured her adjustment of status by fraud. Petitioner is qualitatively admissible to the United States and possesses the familial relationship required by section 241(f).

sion that section 241(f) has no application to the alien who fraudulently procures permanent residence by an adjustment of status within the United States.

Petitioner then filed a petition for review challenging the Board's determination. In a summary order, the Court of Appeals affirmed the decision of the Board of Immigration Appeals (Appendix A).

REASONS FOR GRANTING THE WRIT

1. There is a conflict among the circuits over whether an alien who is admitted to the United States for permanent residence by the procedure for adjustment under section 245 of the Immigration and Nationality Act is to be treated in the same way as an alien admitted for permanent residence with an immigrant visa obtained abroad. Prior to its decision in *Khadjenouri v. Immigration and Naturalization Service*, supra, the Ninth Circuit subscribed to the view that both classes of immigrants were to be accorded like treatment for the logical reason that both were in functionally similar situations. In *Amarante v. Rosenberg*, 326 F.2d 58 (9th Cir. 1964), the Court said:

> "If the Attorney General adjusts his status to that of a permanent resident under section 245, it is equivalent to the issuance of a visa by a United States Consul outside the United States. The parties agree that when the alien seeks an adjustment of his status by the Attorney General under section 245, the Attorney General performs the same functions as does a consular officer when

> the alien is seeking to enter the country and applies for a nonquota visa. Accordingly, it is appellant's position that when the consular officer acts favorably on a visa or when the Attorney General acts favorably on an application for adjustment of status, the alien is thereby accorded his status, and not when the petition of the spouse is approved.
>
> We agree." (326 F.2d at 61)

And in *Campos v. Immigration and Naturalization Service,* 402 F.2d 758, 760 (9th Cir. 1968), the Court stated:

> "An alien seeking to adjust his status to that of a permanent resident is assimilated to the position of an alien seeking to enter the United States for permanent residence."

It has also been the position of the administrative authorities in the past to equate adjustment of status with entry with an immigrant visa, since the applicant for adjustment must, under the provisions of section 245 of the Act, meet the same substantive requirements as the visa applicant in order to qualify for admission as a permanent resident, and the procedure in establishing eligibility for adjustment parallels the procedure in establishing eligibility for a visa. See *Matter of Smith,* 11 I. & N. Dec. 325 (Board of Immigration Appeals, Oct. 8, 1965); *Immigration Law and Procedure* by Gordon and Rosenfield Vol. 2, §7.7e. Further support for this position is found in the regulations of the respondent which grant the applicant for adjustment the same rights as the visa

applicant to apply for waivers of excludability under sections 212(g), (h), and (i) of the Immigration and Nationality Act, and for the benefits of section 212(c) and section 212(a)(28)(I)(ii) of the Immigration and Nationality Act. See 8 C.F.R. 245.1(f).

Although the summary order of affirmance of the Court below made no mention of *Khadjenouri v. Immigration and Naturalization,* supra, its order undoubtedly rested upon its decision in that case. In the context of interpreting section 241(f) in *Khadjenouri,* the Ninth Circuit abruptly departed from its prior decisions placing applicants for adjustment in pari materia with visa applicants. The Court's brief order of affirmance contains no discussion of the issue, merely stating that there is a difference between fraud after entry [referring to adjustment of status] and fraud to obtain entry [referring to entry with an immigrant visa]. Although the Court's order of affirmance cites *Ferrante v. Immigration and Naturalization Service,* 399 F.2d 98 (6th Cir. 1968), reliance on that case would seem to be misplaced. Counsel for *Ferrante* failed to raise the issue of relief from deportation under section 241(f) in the administrative proceedings. The section was initially invoked on petition for review. In rejecting *Ferrante's* contention that he was eligible for the protection of the statute, the Sixth Circuit simply said that it was not applicable to *Ferrante* because he had entered the United States lawfully as a visitor without fraud or misrepresentation. *Ferrante* contains no discussion of the issue presented in

Khadjenouri and in this case—that is, whether aliens in functionally similar situations should be treated differently solely on the basis of the procedure which they utilized in acquiring their permanent resident status. Since the *Ferrante* Court made no mention of this issue, it is doubtful that it was argued or considered in arriving at decision.

Had this petitioner obtained an immigrant visa abroad on the basis of her marriage to Manuel Tomaneng, rather than adjusting her status within the United States, she would stand in the very same position as *Muriel May Scott,* the petitioner in *Immigration and Naturalization Service v. Errico,* 385 U.S. 214 (1966). This Court held that section 241(f) applied to *Scott* who entered into a fraudulent marriage to procure an immigrant visa and to *Errico* who misrepresented his occupational eligibility for first preference quota status. There is no language in *Errico* suggesting that a distinction should be drawn in the application of section 241(f) between the alien who acquires permanent resident status by fraudulently procuring an immigrant visa abroad and one who follows the procedure of adjusting status within the United States.

The Fifth Circuit, in a case arising in a different context, has recognized the essentially similar function performed by the Attorney General in the adjustment of an alien's status with that of a consular officer in the issuance of an immigrant visa. *Ambra v. Aherns,* 325 F.2d 468 (1963). The apparent conflict between the Ninth and the Fifth Circuits, as well as

the divergent decisions of the Ninth Circuit, concerning the treatment to be accorded visa applicants and adjustment of status applicants, warrants a resolution of the issue by this Court.

2. The decision below substantially affects the administration of our immigration laws since it deprives an entire class of aliens from the relief from deportation afforded by section 241(f). The dissenting opinion of Judge Trask in *Khadjenouri v. Immigration and Naturalization Service*, supra, demonstrates the fallacy of attempting to distinguish between the fraudulent procurement of an immigrant visa and the fraudulent procurement of an adjustment of status when it comes to applying section 241(f). Not only is there a lack of logical foundation for such a distinction, but, as Judge Trask so ably points out, withholding the benefits of section 241(f) from the alien who adjusts status runs counter to this Court's expansive reading of the statute in *Immigration and Naturalization Service v. Errico*, supra. Both the petitioner in the instant case and *Muriel May Scott*, the petitioner in *Errico*, acquired permanent resident status by entering into fraudulent marriages. The fact that this petitioner acquired her permanent resident status by adjustment, whereas *Scott* acquired permanent residence by obtaining an immigrant visa, is purely fortuitous.[5]

[5]Prior to enactment of the Immigration and Nationality Act of 1952, incorporating the provisions of section 245, an alien who desired to acquire permanent residence on the basis of marriage had to travel abroad to procure an immigrant visa and reenter the United States.

The decision of the Court of Appeals contravenes the intent of Congress. Congress chose to facilitate the acquisition of permanent resident status for aliens able to qualify within the United States by its enactment of section 245 of the Act. Certainly, it was not Congress' intention to discriminate against the class of aliens that acquire permanent resident status pursuant to the provisions of section 245. The Ninth Circuit, in a different factual context, rejected the government's contention that section 241(f) applies only to aliens who have procured immigrant visas at consular offices abroad, making the following observations concerning construction of section 241(f) which are pertinent to the instant case.

> "We have always understood that a cardinal principle of statutory interpretation is that Congressional enactments should be read as rational, coherent and purposeful elaborations of legislative policy. They should never be construed as establishing statutory schemes which are illogical, unjust or capricious. We may never ascribe to Congress an intent to provide different rules in functionally similar situations, involving important individual interests such as the right to remain in this country with one's family, based on purely fortuitous factual differences."
>
> *Lee Fook Chuey v. Immigration and Naturalization Service*, 439 F.2d 244, 249 (1971).

In its marked departure from its prior decisions, the Court below in *Khadjenouri v. Immigration and Naturalization Service*, supra, and in the instant case, failed to give adequate weight to *Immigration and*

Naturalization Service v. Errico, supra. In that case, this Court declared that the major purpose of Congress in the enactment of section 241(f) was to maintain family unity. Furthermore, this Court emphasized that in view of the broad humanitarian purpose of section 241(f) the statute is not to be literally applied, and that if some doubt as to the correct construction of the statute exists, such doubt should be resolved in favor of the alien. While we do not believe there is any doubt that the statute applies with equal force to one who enters with a visa and to one who adjusts status, we urge this Court to resolve such doubt in favor of the petitioner in the light of *Errico.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
November 12, 1974.

Respectfully submitted,
ROBERT S. BIXBY,
FALLON, HARGREAVES, BIXBY & MCVEY,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals for
The Ninth Circuit

No. 73-3210

Zenaida Sarmenta Segura, also known as Zenaida Sarmenta Tomaneng,
Petitioner,

vs.

Immigration & Naturalization Service,
Respondent.

(April 5, 1974)

Before: Chambers and Merrill, Circuit Judges

ORDER

The order of the Board of Immigration Appeals entered in this matter on October 4, 1973, is affirmed.

Richard Chambers
Charles M. Merrill
U. S. Circuit Judges

United States Court of Appeals for
The Ninth Circuit

No. 73-3210

Zenaida Sarmenta Segura, also known as Zenaida Sarmenta Tomaneng,
Petitioner,
vs.
Immigration & Naturalization Service,
Respondent.

(August 23, 1974)

Before: Chambers and Merrill, Circuit Judges

ORDER

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

All judges of the Court have been advised of the suggestion for a rehearing en banc and no judge of the Court has requested a rehearing en banc.

Appendix B

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

[Oct. 4, 1973]

File: A18 481 790—San Francisco

In re: Zenaida Sarmenta Segura
formerly Tomaneng

In Deportation Proceedings

Appeal

On Behalf of Respondent:
Robert S. Bixby, Esquire
30 Hotaling Place
San Francisco, Calif. 94111

On Behalf of I&N Service:
Bernard J. Hornbach
Trial Attorney

Charges:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—nonimmigrant visitor—remained longer than permitted

Application: Termination of proceedings under section 241(f)

This case presents an appeal from a decision of the immigration judge on April 10, 1973, denying the respondent's request for termination of these proceed-

ings under section 241(f) of the Immigration and Nationality Act, as amended, and ordering that she be deported to the Philippines. The appeal will be dismissed.

Our review of the record, including briefs submitted by the parties, satisfies us that the hearing was fair, that deportability has been established by clear, convincing and unequivocal evidence, and that the immigration judge properly applied the pertinent legal principles. The respondent's status as a permanent resident of the United States was rescinded in August, 1972, following a determination that she had married a permanent resident alien, Manuel Tomaneng, solely for the purpose of obtaining permanent residence here. Prior to the time of the rescission, the respondent married another lawful permanent resident, Rodolfo Segura, on December 2, 1971, and he is the father of the respondent's United States citizen child born on January 15, 1972. The respondent admitted at the hearing that she had made certain false statements in order to obtain her visitor's visa, but claimed that they had been made at the behest of a travel agent in the Philippines. She further conceded her preconceived intention to remain in the United States (Tr. p. 9, 12).

We have long held that section 241(f) of the Act does not benefit an alien who entered the United States as a nonimmigrant, *Matter of Mangabat,* Interim Decision 2131 (BIA 1972); affirmed *Cabuco-Flores v. INS,* 477 F.2d 108 (9 Cir. 1973). In any event, contrary to counsel's contention, section 241(f)

does not apply to rescission proceedings which are grounded here on the respondent's ineligibility for the status accorded due to her fraud after entry into the United States. The sole question in the rescission proceedings was whether there was eligibility for adjustment of status. Section 241(f) cannot be utilized to save an adjustment of status based on fraud because once rescission has been ordered, the alien reverts to his preadjustment status and the fraudulent adjustment of status is no longer a relevant matter, *Khadjenouri v. INS*, 460 F.2d 461 (9 Cir. 1972). The respondent did not apply for any form of discretionary relief. Accordingly, the appeal will be dismissed.

Order: The appeal is dismissed

Louisa Wilson
Acting Chairman